UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OS TRANSPORT LLC and
HCA MANAGEMENT, INC.

and

Cases 32-CA-25100
32-CA-25399
32-CA-25490

TEAMSTERS LOCAL UNION NO. 350,
INTERNATIONAL BROTHERHOOD
OF THE TEAMSTERS, CHANGE TO WIN

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. PRELIMINARY STATEMENT

On August 15, 2011, Administrative Law Judge Gerald M. Etchingham, hereinafter the Judge, issued his Decision and Recommended Order in the above-captioned matter wherein he found, *inter alia*, that OS Transport LLC and HCA Management, Inc., herein collectively called Respondent, violated Sections 8(a)(1) and (3) of the Act by engaging in a campaign of serious unfair labor practices, including implying that employees' attempts to obtain Union representation were futile, promising employees benefits to abandon their support for the Union, threatening to terminate employees, threatening to close the business, threatening to reduce and reducing employees' assignments and hours, and discharging employees, all in retaliation for their activities on behalf of Teamsters Local Union No. 350, International Brotherhood of Teamsters, Change to Win, herein called the Union, and/or their other protected concerted activities.

On September 12, 2011, Respondent filed its exceptions to the Judge's decision and a

brief in support thereof. Pursuant to the Board's Rules and Regulations, Series 8, as amended, Section 102.46, Counsel for the Acting General Counsel hereby files the following answering brief to Respondent's exceptions.[1]

II. THE JUDGE MADE APPROPRIATE FINDINGS OF FACT & CONCLUSIONS OF LAW [2]

As detailed herein, the Judge made appropriate findings of fact and conclusions of law regarding Respondent's operations and its retaliatory response to its employees' Union and protected concerted activities. The Judge's findings of fact are fully supported by the record evidence and entirely grounded in his discrediting of Respondent's woefully dishonest witnesses. The Judge's conclusions of law are supported by his factual findings and relevant legal authority. Respondent essentially concedes that many of the Judge's factual findings and legal conclusions are correct, as it has not filed exceptions over many of his findings against Respondent.

A. Respondent's Operations

Respondent is engaged in the business of hauling waste and recycling materials between various landfills and recycling plants in and around San Jose, California. The Judge properly concluded that both companies performing the work of Respondent, OS Transport LLC and HCA Management, Inc., constitute a single employer under the Act. (ALJD 16:40-21:3) Respondent is owned and operated by Hilda Andrade and her two children, Oscar Sencion, Jr., and Crystal Sencion, with Andrade serving as the managing partner and overseeing all of Respondent's

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[1] References to the Administrative Law Judge's Decision are "ALJD,", followed by the page and line number; references to the underlying transcript are "Tr.," followed by the page number; references to the Acting General Counsel's, Respondent's, Union's, and Administrative Law Judge's exhibits are cited as (GC), (Resp.), (U) and (ALJ), followed by the exhibit number and internal pagination (if available), respectively. The ALJ exhibits contain the entire record of the hearing held and depositions taken in Case 32-RC-5761.

[2] As detailed herein, Respondent makes repeated misrepresentations of fact in its Exceptions and Brief in Support of Exceptions, and its arguments entirely rely upon "facts" that were clearly discredited by the Judge. The Judge's credibility rulings regarding these matters are fully supported by the record, as cited herein, and Respondent has not met its burden under *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950) to overrule those findings. Thus, Respondent's exceptions and supporting arguments are without merit and should be rejected.

operations. (ALJD 3:9-15) Contrary to Respondent's urgings and its witnesses' incredible testimony, the Judge properly concluded that Oscar Sencion, Sr., the father of Andrade's children, is a statutory supervisor of Respondent's drivers and oversees Respondent's day-to-day hauling work, including assigning drivers to specific routes and Saturday work. (ALJD 4:20- 5:32, 21:5-23:18) Beginning in May 2010, Sencion began relaying orders and assignments to the drivers through mechanic Felipe Campos, whom the Judge correctly found to be a statutory agent of Respondent.[3] (ALJD 9:10-16; 23:21-24:33)

Beginning in January 2010, Respondent forced its drivers to incorporate themselves, under threat of termination. Respondent prepared the drivers' incorporation applications and paid all fees associated with their incorporation. Respondent repeatedly threatened the drivers with termination if they did not sign the documents necessary for incorporation and "corporate" contracts with Respondent. Respondent did not translate the documents for the primarily monolingual Spanish-speaking drivers and did not provide them with copies of the documents they were forced to sign. (ALJD 6:1-55, 7:26-8:4) The Judge found the resulting "corporations" to be shams created by Respondent in an attempt to insulate itself from the obligations and liabilities of the employer-employee relationship. Based upon a review of the drivers' true employment relationship with Respondent, the Judge found the drivers to be statutory employees within the protection of the Act, and he flatly rejected Respondent's claim that the drivers were independent contractors. (ALJD 25:1-27:21)

B. Respondent's Unlawful Reaction to the Advent of Unionization

In early April, following their forced incorporation, drivers Marcial Barron Salazar and Jesus Garcia Marquez contacted the Union for assistance, and the Union immediately began

[3] Unless otherwise noted, all references to dates herein refer to the year 2010 and all references to "Sencion" refer to Oscar Sencion, Sr.

organizing Respondent's drivers. On April 14, the Union filed a petition to represent the drivers in Case 32-RC-5761. Respondent learned of the drivers' effort to unionize during the processing of the Union's petition, a copy of which was mailed to Respondent on April 14. (ALJD 7:1-17) On April 20, 11 pro-Union drivers signed a joint letter of protest regarding their working conditions and forced incorporation. [4] Jesus Garcia Marquez planned to give the letter to Respondent in a show of support for employee Julio Escobar, who was going to testify for the Union at the NLRB hearing in Case 32-RC-5761 on April 22, but the hearing was continued to May 5. On the morning of May 5, Marquez submitted the protest letter to Respondent, along with the subpoena he received from the Union to appear at the hearing, thus identifying for Respondent the drivers who supported the Union. Jesus Garcia Marquez, Miguel Reynoso, Primitive Guzman and Julio Escobar, who had resigned on April 30,[5] testified on the Union's behalf during the hearing, which continued on May 5, 7, and 11. [6] (ALJD 7:18-24; Tr. 70-71, 250-251, 395-397; ALJ 2(b)-2(d))

Upon learning of the drivers' efforts to unionize, Respondent engaged in a swift campaign to coerce employees, which was carried out through various threats and promises that were in turn implemented by retaliatory reassignments and reductions to Union supporters' hours and earnings and the termination of two leaders of the organizing efforts.

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[4] The letter was signed by Marcial Barron Salazar, Jose Primitivo Guzman Marquez, Miguel Reynoso Fragoso, Alberto Pizano, Enedino Millan, Julio Escobar, Jose Velasquez Gusman, Ceferino Urias Velasquez, Efrain Gutierrez Najera, Jose M. Urias and Jesus Garcia Marquez. (GC 4)

[5] Julio Escobar refused to sign the "corporate contract" during an April 30 meeting held by Respondent and was immediately forced to resign in front of the other employees at the meeting. (ALJD 7:36-37, Tr. 64-67, 152-155, 340-341, 387-392, 408, 538-539, 592-596)

[6] Andrade failed to appear at the hearing and, despite receiving a Board subpoena mandating her to appear and testify in the proceeding. Sencion appeared, but offered vague and misleading testimony, claiming not to know simple facts about the company, such as who owned the company or whether the company had any offices. Due to difficulties obtaining evidence regarding Respondent's operations, the hearing was adjourned and the Region subpoenaed Andrade and Sencion to submit to depositions, which were conducted on July 7, 13 and 14 and September 13 and 14. Later, pursuant to a stipulation of all parties, redacted testimony from the depositions was introduced into the record of the representation proceeding and the Regional Director issued a Decision and Direction of Election in Case 32-RC-5761 on January 14, 2011. (ALJD 9:33-39, Tr. 1039-1041, 1093-1094; ALJ 2(c) at p. 298-303; Un. 1)

At an April 30 meeting, Andrade unlawfully told employees that their efforts to unionize were futile when she and her attorney advised them that it was not possible for them to get help from a union, or to be part of a union, because they were now owners of their own companies, and if they wanted to bring in a Union, they would have to bring it into their own companies. (ALJD 7:40-43, 27:24-28:3, Tr. 64-67, 152-155, 340-341, 387-392, 408, 538-539, 592-596). Respondent has not excepted to the Judge's finding that Andrade's statements violate Section 8(a)(1) of the Act.

On May 6, driver Miguel Reynoso called Sencion because the Union was calling him to testify at the May 7 NLRB hearing. When Reynoso started the conversation by asking Sencion what was going on, Sencion stated, you know better than I do, you signed the letter saying that you wanted to be unionized. Reynoso admitted that he had signed the letter and stated that all of the drivers were in agreement. Sencion countered that not everyone agreed and said that Jose Victor Vargas and Ceferino Urias Velasquez had not signed it. Reynoso argued that Velasquez had signed it and Sencion invited him down to Respondent's yard to look at the letter for himself. When Reynoso arrived at the yard, Sencion and Andrade bombarded him with unlawful threats. Sencion told Reynoso that all of the employees that signed the letter were going to be fired by the end of May, and that those drivers who did not sign the letter would continue working. Sencion said that Respondent could hire new drivers and that Reynoso and the others who signed the letter would be without work. Sencion also said that he was going to close the company. Reynoso reviewed the protest letter with Sencion to determine whether Velasquez had signed it, as Reynoso believed.[7] When Reynoso became confused about whether Urias signed the protest letter, he

[7] Ceferino Urias Velasquez supported the Union and authorized Julio Escobar to sign the letter on his behalf, but Escobar misspelled his name. (Tr. 350-352, 358) Because Respondent is familiar with Velasquez' signature, Respondent believed his signature was forged and, at least initially, did not believe that he supported the Union. (ALJ 3(a) at p. 268-269)

vacillated regarding his support for the Union. He explained to Andrade and Sencion that he had not read the letter before he signed it. Andrade told Reynoso that he was an idiot for not reading the letter before he signed it and said that she was sorry that the drivers who signed the protest letter would be fired, but that she was safe because she had a job. Sencion told Reynoso that if he was no longer supporting the Union, then he could go back to working his Watsonville route, which was a more profitable route that Sencion had recently taken away from him. The Judge correctly found that Andrade's and Sencion's statements listed above violated Section 8(a)(1) of the Act and Respondent has not filed exceptions to those findings. (ALJD 8:11-9:9, 28:5-29:17)

Respondent has taken exception to only one of the independent Section 8(a)(1) violations found by the Judge regarding Sencion's May 6 conversation with Reynoso. In this regard, the Judge correctly found that during the meeting, Sencion told Reynoso that Julio Escobar, who had resigned on April 30, had asked for his job back and that Sencion had told him that he could come back, but now he was never, ever going to give Escobar his job back. (ALJD 9:3-9; Tr. 251-261, 218, 327) The Judge properly concluded that Sencion's statement constituted a threat of retaliation for Escobar having engaged in Union activity in violation of Section 8(a)(1) of the Act. (ALJD 29:1-3) Contrary to Respondent's exceptions, the Judge did not find that Sencion specifically said that he wouldn't give Escobar his job back "because of his union support." (ALJD 9:3-9) Rather, the Judge noted that Escobar had signed the protest letter and, given the fact that the statement was made in the context of numerous threats to fire and retaliate against other Union supporters who signed the protest letter, the real implication of Sencion's statement was that he had decided not to rehire Escobar because he signed the letter.[8] Notably, Respondent has

[8]Because the employees who signed the letter were also those that supported the Union, it is clear that Respondent was motivated by animus toward its employees based on both their protected concerted activities and their Union activities and that it did not distinguish between the two. Sencion equated the signing of the letter with supporting the Union when he told Reynoso that he had signed the letter stating that he wanted a Union. (Tr. 252) Andrade

not filed exceptions to the Judge's similar findings that Andrade's and Sencion's threats to fire and retaliate against employees that "signed the letter" constituted unlawful threats to terminate employees because of their Union sentiments, even though their statements did not specifically refer to the Union. (ALJD :11-9:9, 28:5-29:17)

The Judge also correctly found that on a Saturday in May, Sencion mentioned to employee Ceferino Urias Velasquez that the Union was suing him. Velasquez stated that it was not a lawsuit, that it was simply that all of the drivers wanted to be in the Union. In response, Sencion said that he was going to diminish the hours of the drivers that wanted the Union, down to a few hours a day and pay them only $20 a day. He stated that he could hire non-Union drivers who own their own trucks and give the Union supporters' work to the owner-operators. (ALJD 9:18-31) The Judge properly concluded, without exception, that Sencion's statements constituted retaliatory threats to reduce employees' hours and pay in retaliation for their Union activities in violation of Section 8(a)(1) of the Act. (ALJD 29:19-37) These undisputed findings further support the Judge's conclusion that Sencion's May 6 statements to Reynoso regarding Escobar were based on Escobar's signing of the April 20 protest letter – which Respondent equated with Union activities – and that Reynoso understood it that way as well.

C. The Credibility of Respondent's Witnesses

While Respondent has filed numerous exceptions to the Judge's factual findings and conclusions of law, a cursory review of those exceptions reveals that they are fundamentally based on Respondent's disagreement with the Judge's credibility findings. Since the Judge's credibility determinations in this case were soundly based upon his observations of the

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also testified that she understood that the employees who signed the letter were those that wanted the Union, and it appears that she may have believed the signed letter to be a petition for representation. (ALJ 3(a) at p. 264-265; ALJ 4(d) at p. 308-310). In such circumstances, Respondent's unlawful response to the employees' activities violate both Section 8(a)(1) and 8(a)(3).

witnesses' demeanor, they are entitled to great deference and Respondent has failed to show by the clear preponderance of all the relevant evidence that they were incorrect.[9] (ALJD 2:24' 15:1-16:37) As such, Respondent's exceptions and supporting arguments are without merit and should be rejected in their entirety.

The Judge's credibility determinations are significantly based on the terrible deportment of Respondent's various witnesses, including, most particularly, Hilda Andrade, Oscar Sencion and Felipe Campos. As found by the Judge and referenced herein, Respondent's witnesses regularly contradicted each other, were repeatedly impeached by their Board affidavits and depositions, and were inherently unbelievable, particularly given the wealth of consistent, believable testimony of the employee witnesses. (ALJD 5:45-52; 9:43-48, 15:39-45, 16:11-28, 32:48-54, 33:18-23) Indeed, the Judge found Respondent's principal witnesses, Andrade and Sencion, both of whom carried out all of Respondent's unfair labor practices, to be wholly unreliable and disingenuous. Andrade, who was present in the courtroom throughout the hearing, changed her testimony repeatedly on crucial issues and patently fabricated facts in a blatant effort to defend her own actions. Her demeanor was plainly conniving and deceitful, and the Judge properly found her to be unworthy of belief as to any of her testimony. The Judge similarly rejected Sencion's testimony in its entirety. (ALJD 23:1-9, 32:48-50, 35:114)

In contrast, the Judge found the testimony of employee witnesses Miguel Reynoso, Alberto Pizano and Jesus Garcia Marquez to be particularly believable and he described their demeanor and testimony as honest, impressive, earnest, convincing and genuine. (ALJD 15:24-37; 16:11-13, 32:50, 34:42-54) Moreover, several employee witnesses, including Miguel Reynoso and Primitivo Guzman, were current employees testifying against Respondent and, as

[9] *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950).

the Judge noted, such testimony is particularly reliable as employees are unlikely to give false testimony against their current employer.[10] (ALJD 8:49-54, 28:49-54)

D. Respondent's Retaliatory Changes to Union Supporters' Work and Hours

Upon learning of its employees' support for the Union and concerted complaints regarding working conditions, Respondent immediately embarked upon a harsh campaign to discourage employee support for the Union by reducing Union supporters' work assignments, reassigning more lucrative routes to employees who did not support the Union, eliminating Union supporters' opportunities to work on Saturdays, and by not recalling Union supporters to work if their trucks broke down and/or delaying repairs of their trucks. The Judge correctly determined that Respondent's retaliatory changes and reductions to the Union supporters' work assignments violated Sections 8(a)(1) and (3) of the Act. As noted by the Judge, the effect of these changes on all pro-Union employees is clearly demonstrated by their reduced earnings following their identification as Union supporters, particularly when compared to the increased earnings of the non-Union drivers during the same period. (ALJD 10:1-12:17, 30:1-13)

Respondent concedes that Respondent made these retaliatory changes, as found by the Judge, with regard to four drivers: Jesus Garcia Marquez, Alberto Pizano, Miguel Reynoso and Marcial Barron Salazar, as it has not taken exception to the Judge's findings as to those drivers. However, Respondent has filed exceptions to the Judge's findings that Respondent engaged in the same retaliatory conduct toward the other pro-Union drivers, Enedino Millan, Jose Velasquez, Efrain Gutierrez Najera, Jose M. Urias, Ceferino Urias Velasquez, and Primitivo Guzman, based primarily on the fact that the financial impact of the retaliatory changes on these drivers was "less

[10] The Judge properly rejected the testimony of current employees Jose Victor Vargas and Rafael Diaz Martines as wholly false. Their testimony was contradicted on nearly every salient point by the other employees' testimony and by documentary evidence. In addition, as the Judge correctly noted, these non-Union drivers benefited greatly through Respondent's unfair labor practices with higher compensation taken from the pro-Union drivers. (ALJD 15:11-13, 15:47-54)

substantial" than that suffered by the other drivers and because four of these drivers did not testify at the unfair labor practice hearing. Respondent's exceptions in this regard are wholly without merit and based upon a fundamental misunderstanding of the burdens under *Wright Line,* 251 NLRB 1083 (1980).

While it is true that Respondent was particularly harsh with the employees who testified on behalf of the Union at the representation case hearing, or who Respondent identified as the leaders of the organizing effort, Respondent's payroll and route assignment records, and the credible record testimony, clearly demonstrate that each driver who signed the protest letter suffered retaliatory changes to their work and hours, and all were impacted financially to some degree after Respondent learned of their support for the Union.[11] In contrast, non-Union supporters and newly-hired employees were rewarded with lucrative and plentiful work assignments and saw their pay increase substantially or, in the case of new hires, immediately surpass the pay of Respondent's long-term employees. (ALJD 101-18; GC 46) In such circumstances, the fact that some drivers suffered "less" discrimination compared to others does not establish that Respondent did not discriminate against them, but only that Respondent did not discriminate against the pro-Union drivers in equal measure.

1. Respondent's Retaliatory Reassignments of Work

On May 5, immediately upon learning that Alberto Pizano, Miguel Reynoso and Efrain Gutierrez Najera signed the protest letter and supported the Union, Sencion pulled them off their assigned Watsonville/Santa Cruz recycling route.[12] This route was particularly lucrative for the drivers for two reasons: 1) they were paid for each leg of the round trip from GreenWaste,

[11] Respondent's payroll and route records, and a summary thereof, are located in GC 45 and 46 and ALJ 4(c) at Ex. 26.

[12] The drivers refer to it as the Watsonville route, though it is referenced on the route sheet used for payroll as Santa Cruz. (Tr. 306-307; GC 18)

Respondent's primary client, to Gilroy because, unlike other drivers, they could pick up a load of recycling at Watsonville on the return to GreenWaste, earning an additional $45 per roundtrip; and 2) because their trucks were loaded when they returned to GreenWaste, they did not have to wait in line to enter the yard, thus they could then enter in front of their empty co-workers and pick up another load on their way out of the yard. (ALJD 11:1-6; Tr. 255, 261-266, 308-312, 580-582, 631, 653-656)

At the hearing, Pizano testified that Sencion called him on May 5, and, without explanation, told him that starting the next day he would no longer be assigned to the Watsonville route. Instead, Sencion ordered him to begin driving trash to Potrero Hills in Fairfield, California, a trip that paid far less per hour of work required and which reduced the drivers' ability to make additional loads each day.[13] As a result of the reassignment, Pizano estimated that his work was reduced from between 5 to 7 loads a day down to between 2 and 4 loads per day and on some days the trip to Potrero would take so long that he would only make 1 load that day. Prior to his May reassignment, he was rarely assigned to haul loads to Potrero Hills and such work was typically assigned to newer, less senior employees. Following this conversation Sencion never spoke to Pizano again. (ALJD 10:43-48; Tr. 580-583, 631-639, 800-801) Reynoso also testified that Sencion pulled him off of the Watsonville route after learning of his support for the Union, even though he had been driving that route nearly every day, and often 2 or 3 times per day, for years. Reynoso also testified that Sencion no longer permitted him to drive his truck home each night, which he had been permitted to do for the years that he had been driving the Watsonville route, and which benefited him because he lived far away from the yard. Sencion also stopped speaking

[13] The GreenWaste to Potrero Hills trip pays $70 per load, but it takes between 4 and 5 hours depending on traffic, whereas the regular GreenWaste to Z-Best route pays $35 for a trip that takes under an hour and a half. Thus, drivers who are assigned to the GreenWaste-Z-Best route are able to pick up more paid loads in the time that it would take to go to Potrero Hills. Moreover, drivers who are assigned to pick up loads at Watsonville are paid an additional $45 for the round trip. (Tr. 585, 651)

to Reynoso following his reassignment. (ALJD 11:3-5; Tr. 255, 261-266, 308-312, 797, 800-801)

The payroll records corroborate the employees' testimony regarding the reassignment of the Watsonville route to newer employees and employees who did not support the Union. After their removal from the Watsonville route, Pizano, Najera and Reynoso were only assigned to the Watsonville route on rare occasions. Indeed, Pizano did not drive the route again until September, when he drove 3 Watsonville loads, and then he did not drive the route again before his November 18 termination. Similarly, Reynoso and Najera resumed occasional trips beginning in September, with each driving only approximately 6 loads for the remainder of the year. In contrast, the payroll records reflect that beginning on May 6, non-Union supporting drivers Jose Victor Vargas, Reynaldo Del Rio and Margarito Ruiz assumed the daily Watsonville loads. The payroll records demonstrate that Vargas was first assigned to drive the Watsonville route on May 6, and that he drove it virtually every day since, indeed averaging 18 trips per pay period.[14] Margarito Ruiz was hired by Respondent on May 13 and he was immediately assigned to the Watsonville route starting on May 14 and continued to drive the route on a daily basis, averaging more than 15 trips per pay period. Similarly, Reynaldo del Rio Hernandez was hired by Respondent on May 18 and he started driving the Watsonville route on his first day, and continued to do so ever since, averaging more than 13 trips per pay period. (ALJD 11:7-16; GC 45; ALJ 4(b) at Ex. 26)

Primitivo Guzman, an employee who had worked with Sencion hauling waste for nearly 10 years, was told by mechanic Felipe Campos after his testimony at the NLRB hearing on May 7 that Sencion said that he could longer driver his regular route (picking up loads from Zanker Road

[14] During the trial, Vargas admitted that he has been driving that route every day since May and confirmed that his pay has increased since his assignment to the more lucrative Watsonville route. (Tr. 955-967) However, contrary to Vargas' testimony that he drove the route on a daily basis during the period from January to May, the payroll records demonstrate that Vargas did not drive the route once in 2010 prior to May 6. In fact, Vargas was not even working for Respondent during the period from January 20 to April 23, a fact which he admitted during cross-examination. (Tr. 951-952)

in San Jose). As a result of the changes to his route assignments, Guzman's average number of loads dropped from between 4-6 per day to between 2-4 loads per day. In addition, Guzman testified that he had regularly been assigned to special projects for Sencion, including picking up trucks from various locations in California and Arizona, and in May those special jobs were reassigned a non-Union supporter, Rafael Diaz Martines. Indeed, the payroll records reflect that prior to May 7, Guzman performed various tasks for which he was paid either $20 per hour, or a flat-rate of $150-$200, and following May 7 those unique trips are reflected in Rafael Diaz Martines' payroll records. (Tr. 395-401, 411-415, 429-490, GC 45)

After Jesus Garcia Marquez testified on May 5 at the Board representation hearing and turned the protest letter into Respondent, his loads were cut from approximately 4 to 5 loads per day down to 3 or 4 trips per day; he was reassigned to work the less lucrative trash route to Potrero Hills; was sent home early on days when there was work available; and he was never assigned to work another Saturday prior to his termination, even though he had routinely worked every other Saturday for years. (ALJD 11:32-34; Tr. 59, 84-91, 120-121, 128, 191-192).

Marcial Barron Salazar's work was similarly reduced from an average of 5 loads per day to 2 or 3 loads per day following his identification as a leader of the Union supporters. Despite the fact that Salazar openly renounced his support for the Union and made little effort to hide his efforts to bolster Respondent's case through misleading and false testimony, Salazar admitted on cross-examination that, after Respondent received a copy of the protest letter that he wrote, Sencion ordered him to be sent him home early for the day, even thought there was plenty of work available, and that when he called Sencion to complain about being sent home early and stated that he was going to go back and see who continued working, Sencion responded "do what you what, I don't give a fuck, anyway, you are really good at writing letters like you did." (ALJD 11:18-22;

Tr. 540-543)

2. Respondent's Retaliatory Elimination of Saturday Work

Immediately after receiving the signed protest letter and learning the identity of the Union supporters, Respondent ceased calling the drivers to work on Saturdays. The employees testified that prior to May 2010, Sencion assigned the drivers to work on Saturdays on a rotational basis and that they averaged 2 Saturdays per month. Since there was not enough Saturday work for all drivers, on Fridays Sencion would decide, based on the amount of material to haul, which drivers would be called to work the following day. However, beginning on Saturday, May 8, Sencion stopped assigning Saturday work to the Union supporters. (ALJD 11:23-29, 32-34, 38-42, 48-50; Tr. 86-88, 92, 120-121, 138, 266-269, 298-299, 314-318, 400-401, 410-412, 428, 434-438, 598-599, 634-638)

Respondent's payroll and route records corroborate the employees' testimony and reflect the immediate changes to their Saturday work assignments. For example, Jesus Garcia Marquez and Alberto Pizano were not called to work on Saturday, May 8 and neither worked another Saturday prior to their terminations in October and November, even though they had regularly worked Saturdays prior to Respondent learning of their Union activities. Miguel Reynoso, Primitivo Guzman, Efrain Guiterrez Najera and Jose Velasquez Gusman were likewise not called to work on Saturday, May 8 and did not work another discretionary Saturday for the remainder of the year. While each worked two or three Saturdays in 2010 after May 8, these were Saturdays to replace non-working weekdays on holidays, not additional weekend work during a normal workweek.[15] These assignments were a marked change from the employees' regular Saturday

[15] For example, Reynoso, Guzman and Najera only worked on Saturday, November 27, in lieu of the Thanksgiving holiday, and Saturday, December 18, in lieu of a non-working Monday on December 20. (Tr. 266-269) Velasquez worked one additional holiday, July 10, in lieu of July 4. Reynoso also testified that he had been recalled on a couple of Saturdays in January and February 2011, just prior to the hearing. (Tr. 298-299)

work they had performed prior to May 2010. Indeed, Primitivo Guzman testified that he had been offered work every Saturday in the eighteen months prior to his Union activities and the only reason he would not work on a Saturday was if he declined the work. The other drivers averaged two Saturdays per month, which supports the employees' testimony that they generally rotated work on Saturdays. After Respondent learned that Jose Urias, Enedino Millan and Ceferino Urias supported the Union, their Saturday work was reduced to an average of 1 Saturday a month, including the Saturdays to replace holiday or non-working weekdays.[16] Marcial Barron Salazar, who wrote the protest letter, was not assigned any Saturday work (including holiday Saturdays) from May 8 until mid-October, when he admittedly begged Hilda Andrade to forgive him for his Union activities. Since then, Barron Salazar worked virtually every Saturday until the end of the year.[17] (ALJD 11:21-24)

The payroll and route records also establish that instead of assigning this work to Union supporters, Respondent assigned the work to new employees and non-Union supporters, like Jose Victor Vargas, Margarido Ruiz, Reynaldo Rio, Rafael Diaz Martines and Bernadino Vilches. Indeed, each of these drivers averaged 3 or more Saturdays per month. In fact, Vargas worked every Saturday in May, June, July, September and November, and 3 Saturdays in every other

[16] After working May 8, Jose M. Urias was not called for Saturday work until late August and then only worked a couple of non-holiday Saturdays in October. It should also be noted that initially Respondent did not believe that Ceferino Urias Velasquez supported the Union because Escobar signed his name incorrectly on the letter. Thus, he continued to receive Saturday work in May, June and July; however, by September he was limited to working on holiday Saturdays. While he downplayed the decrease in his work at trial while testifying in front of Andrade, where he stated that he received "practically" no punishment, he was impeached by his affidavit testimony, where he swore under oath that his work had been reduced and reassigned to newer drivers. (Tr. 344-346) His payroll records also reflect that, contrary to his testimony, he averaged 2 trips in each month of 2010 prior to May and his work reduced to no work on Saturdays in September, only one load in October, and then only one holiday Saturday in November and December. Also contrary to his testimony suggesting that the reduction in his work described in his affidavit could be due to seasonal changes in work loads, his payroll records reflect that in 2009 he worked 4 Saturdays in October, 2 in November and 3 in December. He also admitted that the low season for material at GreenWaste was January and February, not the autumn months when he was not given Saturday work. (Tr. 353-354; GC 45, 46; ALJ 4(c) at Ex. 26)

[17] Marcial Barron Salazar's similar attempt to explain that the reduction in his work was due to seasonal fluctuations in material is also wholly without merit and he was repeatedly impeached with his prior testimony to the contrary. (Tr. 540-543)

month. (ALJD 11:28-30; GC 46)

3. Respondent's Retaliatory Layoffs and Failure to Repair Trucks

Respondent also reduced Union supporters' work by failing to provide them with a spare truck when their assigned trucks broke down and by delaying repairs on their trucks. (ALJD 11:33-51) Miguel Reynoso testified that when his assigned truck broke down on May 18 he was sent home with no work for 12 days, even though the repair should have taken between 4 and 6 hours, and there were two spare trucks available. In fact, when he turned the truck over to mechanic Felipe Campos for repairs, Campos, who would normally have assigned him to a spare truck, instead told him that Sencion had ordered him to remove all of his personal items from his truck, including the radio that he had installed. Reynoso had never been told to remove his personal belongings from the truck when leaving it for repairs, so this order from Sencion sent the unmistakable message that Reynoso was being fired, particularly after Sencion told Reynoso on May 6 that he was going to fire the Union supporters by the end of May. Unlike prior breakdowns when he was given a spare truck, Reynoso remained out of work for 12 days and did not drive another load until Campos called him and advised him he could return to work on May 31. (Tr. 270-273, 287-288, 323-324)

Primitivo Guzman was similarly sent home on two occasions after his truck broke down and Respondent delayed in repairing it. On the first occasion, he was off work for 15 days after the motor on his tarp cover broke and he missed another 4 days due to oil and water leaks. Again, Campos sent Guzman home without work, even though spare trucks were available for him to drive. On the longer layoff, when Campos failed to call him to return to work for over a week, Guzman applied for and received unemployment compensation. He testified that in the 10 years he had been performing this same work for Sencion he had never had to wait so long for a repair,

and had never previously applied for unemployment while waiting for a repair. (Tr. 393-405, 413-414, 423-424, 436-437)

Alberto Pizano was also left without regular work for 6 weeks while waiting for Campos to repair his truck from the end of July through August.[18] Pizano's assigned truck had been converted from a two-axle to a three-axle truck and the weld on the added axle broke on two occasions. Campos repaired the first break, which occurred prior to the employees' Union activities, within a couple of hours. However, when the weld broke again in June, after Respondent became aware of Pizano's support for the Union, Campos took nearly six weeks to complete the repair. Like Guzman, Pizano applied for and received unemployment insurance. Unlike prior occasions when his truck had broken down, Pizano was not given a spare truck to drive and was only called in occasionally during that time to fill in for another driver who was out. (Tr. 605-612)

Unlike the Union supporters who were left without work when their trucks broke down, both Jose Victor Vargas and Rafael Diaz Martines testified that when their trucks down, even with large repairs that took weeks to fix, either Campos or Andrade assigned them to work in a spare truck and they did not miss a single day of work. (Tr. 900-901, 927, 937-939, 961)

4. Respondent's Exceptions to the Judge's Findings of Retaliatory Changes

Based upon the clear record evidence, the Judge properly found that Respondent's changes to Union supporters' work assignments and hours violated Sections 8(a)(1) and (3) of the Act. Contrary to Respondent's exceptions, the Acting General Counsel clearly met his burden under *Wright Line* to establish a prima facie case. Respondent learned the identity of the Union supporters upon receiving the April 20 protest letter and immediately began retaliating

[18] Consistent with Pizano's testimony, payroll records indicate that during the period when Campos claimed Pizano's truck was still under repair, Pizano worked only one day between July 1 to July 19, returned to pick up loads to cover for two employees' absence, and then worked only 3 days during the period from August 6 to August 23. (Tr. 608-609, 645-647)

against them by changing their route assignments, cutting their Saturday work, reducing their hours and earnings, and leaving them on extended layoffs while awaiting repairs. There can be no question that the motive for the changes was retaliatory, particularly given the timing of the changes and Sencion's announcement to employees Miguel Reynoso and Ceferino Urias Velasquez that he was going to reduce Union supporters' work and hours and eventually replace them with newer employees or owner-operators.[19] Also, as noted by the Judge, the record is replete with evidence of Respondent's animus toward the employees' support for the Union. (ALJD 32:26-43.) Indeed, Sencion made no effort to hide his hostility toward employees' Union and ceased speaking with the Union supporters when he saw their signatures on the protest letter, which occurred at the same time the retaliatory changes were instituted, even though many of them had previously been his friends.[20] One of the most telling examples of Respondent's retaliatory motivation for its work assignments is demonstrated by the immediate restoration of Marcial Barron Salazar's Saturday work, including a corresponding increase in pay, in October 2010 when he abandoned his support for the Union and begged Andrade for her forgiveness for his Union activities. (ALJD 16:24-29; Tr. 540-554; GC 45, 46)

Respondent's exceptions are based purely on the fact that the Judge did not enumerate each change inflicted upon every Union supporter and suggests that there can be no retaliation against certain Union supporters because they suffered less "substantially" than others or because they did not testify at the unfair labor practice hearing. Respondent's exceptions in this regard are wholly

[19] Sencion reiterated his plan to terminate the Union supporters to GreenWaste Manager Rick Lopez, a witness whom the Judge found to be very credible. Lopez testified that Sencion called him shortly after he hired one of Respondent's former drivers on May 6. Sencion mentioned that he was having problems with the Union and told Lopez that he believed the Union was paying the former driver to infiltrate GreenWaste's employees. Sencion also told Lopez that he was going to hire more drivers and get rid of his "problematic employees." (ALJD 16:1-5; Tr. 465-468)

[20] Sencion explained that he stopped speaking to them because they were "problematic" people who were creating problems for the company. (Tr. 780-781, 797, 800-801, 818-820)

without merit. As noted by the Judge, Respondent's payroll and route records demonstrate that Respondent retaliated against the Union supporters with changes to their routes and work assignments. As detailed above, the records clearly demonstrate that each driver who signed the letter saw, *at the very least,* their Saturday work reduced following their identification as a Union supporter.

Contrary to Respondent's exceptions, there is no requirement that each alleged discriminatee appear and testify regarding the changes inflicted upon them by Respondent in order for the Acting General Counsel to establish a prima facie case. Indeed, it is well-settled that where, as here, the record sustains the allegations of discrimination against an employee, the employee is not required to testify in order to be eligible for relief under the Act. See *Cutting, Inc.*, 255 NLRB 534 (1981); *Riley Stoker Corp.*, 223 NLRB 1146 (1976), and cases cited therein. Moreover, contrary to Respondent's exceptions, there is no requirement under the Act that each alleged discriminate receive the same level of retaliatory treatment or that the Judge identify each instance of retaliation. [21] Indeed, once a discriminatory motive for Respondent's conduct is established, it is not disproved by evidence that Respondent did not take similar or equal action against all Union adherents. *American Petrofina Co.*, 247 NLRB 183, 193 (1980).[22] Finally, it is notable that the vast majority of Respondent's drivers supported the Union and, since Respondent still needed their services to fulfill its obligations to its clients, it would be difficult, if not impossible, for Respondent to cut all of their work assignments to the same degree suffered by the lead Union adherents or those who testified against Respondent in the May representation case

[21] Contrary to Respondent's claims, the exact monetary losses suffered by each discriminatee is irrelevant to the overall finding of discrimination and is a matter to be determined upon compliance, rather than a matter before the Judge.

[22] See also, *Leshner Corporation*, 260 NLRB 157 (1982), citing *W.C. Nabors Company*, 196 F.2d 272 (5th Cir. 1952); *Vemco, Inc.*, 304 NLRB 911, 913 (1991); *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991); *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987); *Link Mfg. Co.*, 281 NLRB 294, 299 fn. 8 (1986).

hearing.

Notwithstanding the varying degrees of retaliation suffered by the Union supporters, the record evidence clearly establishes that Respondent changed all of the Union supporters' work assignments, particularly their Saturday work, in retaliation for their Union support. Respondent essentially concedes such changes occurred when it argues in its exceptions that there are possible explanations, unrelated to a discriminatory motive, for the reductions or changes suffered by the 6 drivers addressed in its exceptions. However, Respondent cannot meet its burden under *Wright Line* by simply suggesting "possible" non-retaliatory reasons why the Union supporters experienced changes in their work assignments and hours, as it has done in its exceptions.[23] Rather, Respondent is under a burden to establish that the changes actually resulted from a non-retaliatory cause or would have been made regardless of the employees' support for the Union. However, there is no record evidence to establish any alternative, non-retaliatory explanation for the changes experienced by the Union supporters. At trial, Respondent offered no coherent explanation or justification for the changes to any of the Union supporters' work during the trial. To the contrary, Respondent's witnesses, all of whom were completely discredited by the Judge, simply denied that any changes were made.[24] Respondent also offered no explanation for failing to offer Union supporters' spare trucks or delaying the repair of their trucks. Indeed, the

[23] For example, Respondent suggests that there are "myriad possible reasons" why Enedino Millan ceased working on Saturdays for many months and suggests that Jose Velasquez may have missed numerous days of work in July and only worked one Saturday after May because he "could have chosen to decline opportunities to work."

[24] Sencion testified that he had no involvement in drivers' work assignments and Andrade offered wholly vague and self-serving testimony that, to her knowledge, nothing about the company's operations changed after the employees began trying to Unionize, that no drivers were assigned new routes, that no one was giving instructions to the drivers about what routes they were supposed to drive, and that she did not direct or authorize anyone to change the drivers' routes. (Tr. 1049, 1057-1058, 1059-1062, 1065-6) With regard to Saturday work, Andrade testified at the hearing that she had no knowledge of how drivers were assigned to work on Saturdays, that she did not assign Saturday work, and that she did not authorize anyone to inform drivers whether they could work on Saturdays. (Tr. 1049) She also claimed that she did not direct anyone not to call Union supporters to work on Saturday. (Tr. 1057-1058) 1059-1062, 1065-6) However, her testimony fails to account for how the limited Saturday work was divided among the drivers and contradicts her deposition testimony of July 7, where Andrade admitted that GreenWaste would advise Jose Felipe Campos how many drivers they would need for Saturday work and Campos would talk to the drivers and arrange for coverage. (ALJ 3(a) at 250-251)

employees' testimony regarding the breakdowns of their trucks, the unnecessary time that it took Respondent to repair them, and the availability of spare trucks, is uncontradicted.[25]

In addition to being unsupported by any record evidence, several of the "explanations" proffered by Respondent are based upon testimony that was flatly rejected by the Judge or contradicted by testimony credited by the Judge. For example, with respect to Primitivo Guzman, Respondent urges that he suffered periods of extended layoff due to damage he caused to his trailer, which Respondent claims to have sent to GreenWaste for repair and therefore any delay in repair was not caused by Respondent or Campos. However, this argument is based upon testimony from Respondent's witnesses, all of whom were discredited by the Judge. Guzman, whose account of events was credited by the Judge, testified that he was left without work for weeks while waiting for Campos to repair his tarp cover motor and oil cooler, repairs which should have been completed with little to no delay[26] (ALJD 11:33-51) With respect to Efrain Gutierrez Najera, Respondent suggests that because he did not testify there is no "direct" evidence that Respondent removed him from the Watsonville route or cut his work assignments. However, the record testimony and payroll and route records conclusively establish that Respondent removed Gutierrez from his regular Watsonville route, along with Reynoso and Pizano, immediately following their identification as Union supporters, and their Watsonville work was given to non-Union supporters. (Tr. 263-266, 579-582; GC 45) Indeed, Respondent would have the Judge's finding that Respondent pulled Gutierrez off the more lucrative Watsonville route

[25] Campos testified that he could not recall if Pizano's truck broke down and amazingly claimed that he did not even know if Pizano's truck had a third axle added to it, which Pizano testified caused his breakdown and had previously taken only an hour or two to repair. (Tr. 702-703) Campos also could not recall Reynoso's truck breaking down in May and did not deny Guzman's testimony that he remained out of work for weeks while waiting for Campos to finish repairing his truck. (Tr. 704-707). Andrade testified that Respondent had two spare trucks in 2010 and that she could not recall an occasion when a spare truck was not available. (Tr. 1055-1057)

[26] Notably, Campos did not deny Guzman's testimony that he remained out of work for weeks while waiting for Campos to finish repairing his truck. (Tr. 704-707)

overturned simply because he did not testify at the hearing and despite its own records proving that very fact.

With respect to Ceferino Urias Velasquez, Respondent relies upon his testimony that he did not personally experience any change in the amount of work that he did after the delivery of the protest letter. However, Respondent ignores the fact that Velasquez was impeached with his affidavit testimony and later admitted that his Saturday work was being giving to new drivers. This testimony is also corroborated by Respondent's payroll and route records. Respondent also ignores his testimony corroborating other employees' accounts that Respondent retaliated against them by taking their work away from them. (Tr. 345-346). It is difficult for a current employee to testify against his employer's interest in the presence of the employer, and the Judge properly credited Urias Velasquez' testimony against the interests of Respondent when he reported unlawful statements made to him by Sencion, who was not in the hearing room at the time of Velasquez' testimony. However, contrary to Respondent's exceptions, the Judge is not then obligated to credit every aspect of Velasquez' testimony, particularly when he has been impeached on salient points with prior testimony and where he appears hesitant to testify against Respondent's interests on a particular point. Contrary to Respondent's urgings, the principle that current employees' testimony is particularly worthy of reliance only applies when that testimony is given *against* the interests of the employer. *S.E. Nichols, Inc.*, 284 NLRB 566 fn 2. (1987) Notably, Respondent does not except to the Judge's finding that Respondent unlawfully reduced Marcial Barron Salazar's work assignments even though he too initially denied suffering any retaliatory changes and was similarly impeached with his prior testimony. (ALJD 11:18-23; Tr. 540-545)

E. Respondent's Retaliatory Termination of Jesus Garcia Marquez[27]

On or about August 29, Marquez submitted a written request for time off for the period from September 6 to September 20 for the birth of his child. Andrade admits that she received the request, through Felipe Campos, and that she approved the request. Approximately one week into Marquez' approved absence, Andrade cancelled service to his Nextel radio. When Marquez returned to work on September 20, Campos informed him that his truck was under repair. Campos offered Marquez the option of driving a spare truck or waiting for his truck to be repaired. Marquez opted to request another week of leave to wait for his truck to be repaired and submitted a written request for leave through September 27, when Campos estimated that his truck would be ready. Andrade approved Marquez' second leave request. Campos agreed to contact Marquez to advise him when the repair was complete. However, because Marquez' radio was not in service, they agreed to communicate through Alberto Pizano, the driver who was covering Marquez' regular route and who also needed to know when Marquez would be returning because he needed to leave Marquez the trailer used for that route when he returned to work. (ALJD 12:20-44; Tr. 93-98, 166-177, 625-626, 1066-1070)

Pizano checked in with Campos on a daily basis to ask if Marquez' truck was ready and whether Marquez was able to work. Campos continuously advised Pizano that the truck was not ready and Pizano communicated that information to Marquez. On September 30, Marquez went to the yard to pick up his paycheck and check on his truck. At that time, Campos told Marquez in person that his truck was not ready and reassured Marquez that he would let him know when it was ready. Marquez then asked to drive the spare truck, which he could see was available in the

[27] As noted above, all of Respondent's exceptions to the Judge's findings of fact and conclusions of law related to Marquez rely entirely upon the discredited testimony of Respondent's witnesses Andrade and Campos and should be rejected since Respondent has not met its burden to overrule the Judge's credibility findings under *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950).

yard. However, Campos told him no and stated that mechanic Jose Carillo was going to be working on that truck. Marquez asked Carrillo if it was true that he was going to work on the spare truck and Carrillo said yes, and that "he had his orders." Marquez returned home with the agreement from Campos that he would let him know when the repair was complete. While he waited, Pizano continued to check with Campos for Marquez regarding the status of his truck and on each occasion Campos told Pizano that the truck was not ready, which Pizano then communicated to Marquez. (ALJD 13:1-14; Tr. 99-110, 625-626, 640-641, 652, 657-658)

However, on October 15, Andrade sent Marquez a letter terminating him for job abandonment. Prior to sending the termination letter, Andrade did not contact Marquez or otherwise try to find out why he had not resumed working as planned, even though she claimed that she lost money when trucks sat idle. Following his termination, Marquez tried to explain to Andrade that he was waiting for his truck to be repaired, but she cut him off and told him that there was nothing she could do for him. (ALJD 13:14-22; Tr. 627-628)

The testimony adduced at trial and credited by the Judge clearly established that Marquez was one of the lead Union adherents, that Respondent had knowledge of and animus toward his Union activities, and that Respondent was motivated by that animus when it terminated him. It is undisputed that Marquez led the employees' efforts to unionize: he was one of the first employees to contact the Union and he was the first employee to testify on behalf of the Union at the May 5 Board representation hearing. In addition, Marquez exposed his lead role in obtaining signatures on the protest letter by personally submitting the letter to Respondent, along with his subpoena to testify on the Union's behalf at the Board hearing. (Tr. 68-83; ALJ 2(b); GC 3, 4, & 8)) Respondent was aware of his activities and harbored animosity toward him and the other Union supporters, as detailed above. Indeed, in her September 13 deposition, which took place

prior to Marquez' termination, Andrade admitted that she knew that Marquez was one of the employees who decided to call the Union and that she considered him to be one of the leaders of the group that supported the Union, and she repeatedly referred to him as a complainer and whiner. (ALJ 4(c) at page 245, 260-261, 278)[28] In light of Respondent's numerous coercive threats and retaliatory actions toward the employees for their Union and protected concerted activities and its knowledge of Marquez' lead role in the organizing, the Judge properly concluded that Respondent harbored animus toward Marquez for his Union activities and that this animus was a motivating factor in the decision to terminate him. (ALJD 31:6-44)

Based upon his findings of animus and discriminatory motivation for Marquez' termination, the Judge correctly determined that the Acting General Counsel met his burden to establish a prima facie case under *Wright Line*, that the burden shifted to Respondent to show that it would have terminated Marquez for legitimate, non-discriminatory reasons, and that it did not meet that burden. As noted by the Judge, Respondent's attempts to legitimize Marquez' termination were not credible and were entirely upon the false and unbelievable testimony of Andrade and Campos, both of whom claimed that Marquez' truck was not under repair and that Marquez simply chose not to return to work following his paternity leave.[29] (ALJD 18-22) In

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[28]As the Judge properly noted, during the trial Andrade contradicted her deposition testimony, claiming that she did not consider Marquez to be a Union leader and claimed that she did not consider him to be a whiner and never referred to him as a complainer. (ALJD 32:48-49; Tr. 1103)

[29] Andrade testified, contrary to Pizano and Marquez, that Marquez' truck was never out of service during his absence and that she did not see any trucks taken apart in the yard during his leave. In an effort to bolster her testimony, Andrade claimed that she made multiple visits to the yard everyday in 2010, varying between 2 to 4 visits each day, implying that she would have seen the truck if it were sitting in the yard. (Tr. 1096-1097) However, her testimony conflicts with employees' testimony, Campos' testimony and her own deposition testimony, all of which establish that she does not go to the yard often and only sees the drivers on paydays. (Tr. 751, 960; ALJ 3(a) at p. 249) She was also unable to articulate any reasonable explanation for why she would make so many trips to the yard each day. (Tr. 1096-1097)

Campos testified unintelligibly about several repairs done to Marquez' truck during his paternity leave, but suggested unconvincingly that the repairs were not large and that Marquez' truck was always available for him to drive. Campos' testimony about the repairs to Marquez' truck was literally incoherent and he was admonished repeatedly by the Judge concerning his unclear and non-responsive testimony. In this regard, he testified vaguely that he performed repairs to the truck, either changing an alternator, a belt or a water hose, replaced "small parts,"

light of Respondent's inability to establish that it would have terminated Marquez absent his Union activities, the Judge correctly concluded that his termination violated Sections 8(a)(1) and (3). (ALJD 33:1-48)

1. Respondent's Exceptions Related to Marquez' Termination

Contrary to Respondent's exceptions, the Judge correctly concluded that Respondent failed to show that it would have terminated Marquez absent his Union activities and rejected its claim that Marquez was terminated for "job abandonment" and that he simply failed to return to work following his paternity leave. Respondent continues to assert this defense in its exceptions, even though the testimony to support this claim was thoroughly discredited by the Judge and stands in complete contradiction to the testimony of Pisano and Marquez, both of whom the Judge found to be reliable and credible witnesses.

Respondent also takes exception to the Judge's factual finding that Campos agreed to contact Marquez when his truck was ready and agreed to communicate with Marquez through Pizano. In support of this exception, Respondent relies upon the discredited testimony of Andrade and Campos, whose testimony in this regard was wholly contradicted by the credible and specific testimony of Pizano and Marquez detailed above. At trial, Campos initially denied that he ever communicated with drivers about the status of the repairs on their trucks or whether they could return to work, claiming that he was not authorized to do so. (Tr. 705-706, 740-742)

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and changed oil, but he could not testify regarding how long the repairs took, how long the truck was out of service, or when the repairs were completed. In fact, he testified that he did not know if the truck had to undergo major repairs or was completely taken apart. Despite his failure to recall what repairs were done or offer a coherent description regarding how long those repairs took, Campos still asserted that there was no reason the truck couldn't be driven between September 7 and October 1. Notably, he did not address whether the truck was operational between October 1 and October 14, when Marquez and Pizano testified that Campos continued to advise them that the truck was not operational and Marquez could not return to work. (Tr. 707-718, 741-743) Campos also claimed that he only performed "small repairs" and basic maintenance on the trucks, and that all other repairs are sent to outside service shops, suggesting that Marquez' truck would not have remained in the yard for a lengthy repair. However, this testimony is contradicted by the employees, including employees called by Respondent, who testified that Campos performed large repairs in Respondent's yard, many of which took weeks to complete. (Tr. 626, 900-902, 939, 961)

However, his testimony is completely contradicted by the drivers, including those called by Respondent, who testified that Campos would tell them when their trucks were ready and he would tell them when they could come back to work. Campos' testimony is also contradicted by Andrade's July 7 and September 14 deposition testimony, where she explained that Campos would communicate with drivers regarding whether a repair was completed and he would call drivers to advise them whether they should come back to work. In fact, in her September 14 deposition Andrade testified that if a repair was not done, Campos would tell the driver not to come to work. (ALJ 3(a) p. 89-91; ALJ 4(d) at 296-297) Ultimately, Campos changed his testimony during the trial and admitted that he could tell drivers the status of the repair on their trucks, and whether their truck was ready for them to drive, and acknowledged that he could assign a spare truck to a driver whose truck was under repair. (Tr. 742) However, he never specifically denied telling Marquez and Pizano that Marquez' truck was not ready, he never denied telling Marquez that he could not return to work until the repair was done, nor did he deny telling Marquez that he would let him know when he could return to work, thus leaving undisputed Marquez' and Pizano's much more detailed and credible testimony that Campos repeatedly told them that Marquez could not return to work because his truck was not ready and that they could see his broken down truck in the yard. (Tr. 100-102, 122-123, 204-205, 625-626, 640-641, 652) As such, Respondent's exceptions to the Judge's factual findings with respect to Campos' communication with Pisano and Marquez regarding the status of repairs to his truck are wholly unsupported by the record evidence and should be rejected.

Respondent takes further exception to the Judge's finding that Respondent subjected Marquez to disparate treatment when it terminated him for job abandonment while he was waiting for his truck to be repaired. As noted by the Judge, Respondent left Reynoso, Guzman, Pizano

and Marquez out of work for extended periods of time waiting for Respondent to repair their trucks. All drivers, even those called by Respondent, testified that when their trucks were being repaired they would check in with Campos to find out the progress of the repair and that Campos would contact them to advise them when their trucks were ready. Indeed, Reynoso, Guzman and Pizano returned to work when Campos called them to come back after each had waited without work for weeks. None of those drivers called Andrade or Sencion to explain their absences, nor submitted written requests for time off work while waiting for their trucks to be repaired, and none were accused of abandoning their jobs. Marquez followed the same protocol while his truck was being repaired, but Campos never called him back to work and he was terminated for "job abandonment." (ALJD Tr. 204-205, 270-273, 402-405, 413-414, 436-437, 605-607, 612, 657-658, 937-939, 961) Respondent attempts to distinguish Marquez' situation from the others by continuing to assert its rejected claim that Marquez was never told that his truck was under repair and he simply failed to return to work following his paternity leave. As noted above, the factual support for this claim is based upon discredited testimony of Andrade and Campos and Respondent's exception is yet another thinly veiled attack on the Judge's credibility findings.

Respondent also takes exception to the Judge's rejection of its claim that the passage of time between Marquez' Union activities and his termination demonstrated that Marquez' termination was not based upon discriminatory motivation. In assessing this claim, the Judge noted that Marquez' initial request for leave came just before Andrade was compelled to testify at several NLRB depositions and that she cut Marquez' Nextel service around the time of her deposition, weeks prior to his termination. There is nothing improper in the Judge noting that the potential unionization of Respondent's employees remained a relevant, ongoing issue for Respondent in September or noting that the fact that Andrade anticipatorily cut Marquez' Nextel

service evidenced a plan to terminate Marquez prior to his supposed failure to return from leave. This is particularly true because Andrade was unable to explain why she cut his Nextel service in September or why she had Campos sign Marquez' initial leave request as a "witness," even though this wasn't her standard procedure. (ALJD 33:28-49; Tr. 1066-1069, 1071, 1099)

Finally, the Judge, citing *Hewlett Packard*, 341 NLRB 492 (2004), properly noted that Andrade's failure to investigate why Marquez had not resumed working and her failure to listen to his attempt to explain what happened to her, further evidences Respondent's discriminatory motivation toward Marquez.[30] Respondent attempts to distinguish the instant case from *Hewlett Packard* by claiming that an employer's failure to investigate s disciplinary action or listen to an employees' explanation can only be evidence of discriminatory intent if the termination was "hastily" carried out, as it was in *Hewlett Packard*, and notes that Andrade waited weeks before Marquez supposedly failed to return from paternity leave to terminate him. In pursing this argument, Respondent wholly misconstrues Board precedent. There is no requirement that a termination be "hastily" carried out in order for an employer's failure to investigate the matter or listen to a proffered explanation to be construed as evidence of discriminatory intent. *See e.g., New Orleans Cold Storage & Warehouse Co.,* 326 NLRB 1471, 1477 (1998) (where employer wrote up employee repeatedly in the weeks leading to his termination and ultimately terminated him for similar offenses without investigating the merits of the discipline or termination). Moreover, and apart from the inference of unlawful motivation that can be drawn from Andrade's failure to investigate Marquez' absence, the record is replete with direct evidence that Respondent

[30] Andrade admitted that she never contacted Marquez to find out why he hadn't returned and that even when she saw Marquez in the yard on September 30 when he came to pick up his check, she didn't even bother to ask him why he had not returned to work or whether he intended to return and when. She offered no reasonable explanation for failing to do so, stating only that it wasn't her "responsibility" to discuss the matter with him. However, this explanation seems illogical in the face of her other claim that she lost money when trucks sat idle. (Tr. 1072-1074, 1057)

harbored animus toward Marquez. Indeed, the Judge found, without exception, that Respondent was retaliating against Marquez continuously during the months prior to his termination by reducing his work assignments, hours and earnings.

F. Respondent's Retaliatory Termination of Alberto Pizano

On or about November 4, Andrade received a DMV pull notice that alerted her to a speeding ticket issued to Alberto Pizano. Andrade contacted her insurance broker, Cristina Bettencourt at Commercial Carriers, and asked her to review Pizano's record and write a letter stating that Pizano was no longer insurable under Respondent's policy. (ALJD 13:26-34; Tr. 1107-1110; GC 37-38)

Commercial Carriers, Respondent's retail insurance broker, then forwarded the matter to Coastal Brokers, the wholesale broker, where underwriter Cheryl Hartz reviewed Pizano's driving record on November 8. Hartz determined that Pizano was not eligible for coverage under Respondent's policy unless Respondent could provide proof that Pizano was not at fault for an April 25, 2009 accident which appeared on his record. According to Hartz, all accidents are deemed to be at fault unless proof of non-fault is received. (ALJD 13:36-43; Tr. 1005-1025; GC 34, 38 & 39) Based upon Hartz' determination, Commercial Carriers sent Andrade an e-mail on November 8 advising her that Pizano was not eligible for coverage unless she could provide proof of non-fault for the April 2009 accident. When a determination of ineligibility is made, the insurance brokers require the insured to submit a signed driver exclusion form, a copy of which was forwarded to Andrade with the November 8 e-mail. (GC 36, 39)

Pizano was not at fault for the April 25, 2009 accident, which occurred in Respondent's truck while he was pulling out of Respondent's yard. Shortly after the accident, he obtained a police report from the California Highway Patrol (CHP) that clearly states that he is not at fault for

the accident, which he turned into Andrade in early May. He also provided Andrade with a written statement explaining the circumstances of the accident, per her request. Pizano also showed the CHP report to Sencion and the two discussed the fact that Pizano was not deemed to be at fault for the accident. (ALJD 13:45-14:15; Tr. 616-623; GC 27, 28)[31]

Despite having this proof of Pizano's lack of fault in his personnel file, Andrade made no effort to retain coverage for Pizano and did not submit the CHP report or Pizano's written statement to Commercial Carriers. In fact, she purposefully concealed from Pizano the fact that he might be able to remain covered if he provided proof of non-fault for the accident. Thus, in a phone call sometime prior to November 18, when Commercial Carriers called to remind Andrade that she needed to submit the signed driver exclusion form if she was not going to submit proof of non-fault, Andrade demanded that Commercial Carriers agent Cristina Bettencourt remove any reference from its communications to her that indicated that Pizano could still be eligible for coverage if proof of non-fault for the April 2009 accident were submitted. When Bettencourt advised Andrade that Commercial Carriers was obligated to notify her that she could provide proof of non-fault for continued coverage, Andrade stated that she no longer wanted to employ Pizano and that she didn't want him to know that he might still be eligible for coverage and demanded that the language be removed. (ALJD 14:17-31; Tr. 1113-1115)

On November 19, Andrade terminated Pizano on the basis that Respondent's insurance company would no longer insure him. Andrade asked him to sign a "driver exclusion form," acknowledging that he was no longer covered under Respondent's insurance. Andrade did not ask Pizano about the April 2009 accident and did not notify him that he might be able to remain eligible for coverage if he could establish proof of non-fault for the accident. To the contrary,

[31] At trial, Andrade did not deny that she had Pizano's written statement regarding the accident in his file and Sencion did not deny Pizano's testimony that he (Pizano) had discussed the accident with Sencion and had showed him the CHP report finding him to be not at-fault for the accident. (Tr. 620-622).

when Pizano told her that there must be some mistake because his license was good, Andrade told him that it was not her problem and she could not help him. Andrade said nothing to Pizano about having too many points on his license. (ALJD 14:33-43; Tr. 612-616)

Like Marquez, Pizano was a Union supporter and signed the joint protest letter that was submitted to Respondent on May 5. Respondent was aware of his activities prior to his termination and perceived him to be one the employees leading the Union effort, along with Marquez and Salazar.[32] As discussed above, Respondent harbored animus against those employees who supported the Union and retaliated against them with various cuts to their employment and other retaliatory measures. Notably, Respondent has not taken exceptions to the Judge's finding that Respondent made retaliatory cuts to Pizano's work assignments and hours. In the circumstances of this case, there is little doubt that this animus also motivated Respondent to terminate Pizano and the Judge properly found that the Acting General Counsel met his initial burden under *Wright Line*. (ALJD 34:1-32)

At trial, Respondent put forth a wholly-fabricated defense to Pizano's termination, and the Judge properly concluded that Respondent failed to meet its burden under *Wright Line* to establish that it would have terminated Pizano notwithstanding his Union and protected concerted activities. In Pizano's termination letter, Andrade justified his termination on the basis that he was no longer eligible for insurance under her policy. (GC 29) However, Andrade was aware of the possibility that he could have remained eligible for coverage and purposefully concealed this possibility from him. Indeed, she could have easily provided the necessary documentation to her broker to retain coverage for Pizano but chose not to do so. At trial, Andrade could not explain why she did not submit Pisano's proof of non-fault for the accident to her insurer or why she sought to hide from

[32] As with Marquez, Andrade admitted in her deposition that she believed Pizano was one of the leaders of the group that supported the Union and she likewise referred to him as a whiner and complainer. (ALJ 4(c) at page 245, 278)

Pizano the fact that he could remain eligible for coverage if he could establish non-fault for the April 2009 accident. Instead, Andrade claimed to have submitted Pizano's written statement regarding the accident to her broker at the time the accident occurred (a physical impossibility since she had not begun using this broker until December 2009) and claimed that she expected the broker to obtain the police reports and to make a determination regarding whether Pisano was at-fault. (Tr. 1107-1109) However, this self-serving and wholly false testimony is in direct conflict with her broker's testimony and, further, was impeached by Andrade's prior affidavit testimony where she swore under oath that she did not remember the April 2009 accident, had allegedly never seen the written statement regarding the accident before, and that no one from her insurance company ever informed her or discussed with her the possibility that Pizano might be able to remain eligible for coverage. (Tr. 1163-1186) Andrade's obviously false testimony, and the fact that she adhered to her fictional account of events despite testifying after hearing the testimony of all of the other witnesses, including the two insurance brokers, vividly demonstrated the extent of Andrade's willingness to fabricate facts to cover up Respondent's unlawful actions and fully justified the Judge's thorough discrediting of her fabricated justification for Pizano's termination. (ALJD 34:34-36:3) Based upon these findings, the Judge correctly concluded that Pizano's termination violated Sections 8(a)(1) and (3) of the Act.

1. Respondent's Exceptions Related to Pizano's Termination

Contrary to Respondent's exceptions, the Judge correctly concluded that Respondent failed to show that it would have terminated Pizano absent his Union activities and the Judge appropriately rejected Respondent's claim that Respondent did not want to employ Pizano any longer because of his poor driving record (regardless of his insurability), a claim which Respondent continues to pursue in its exceptions. As noted by the Judge, this reason was never

articulated to Pizano nor set forth in his termination letter.[33] Moreover, contrary to Respondent's claims, there is ample record evidence that Andrade employed numerous employees with poor driving records, including drivers with multiple accidents and multiple moving violations, and that she fought to secure coverage for those drivers. Thus, after several companies refused to insure some of her drivers, Andrade asked to have those drivers be covered as "probationary" drivers in order to obtain coverage for them notwithstanding their poor driving records. (ALJD 35:15-34; Tr. 1115-1128; GC 40, 42, 43) Andrade made no such efforts for Pizano. Moreover, Respondent incredibly continues to argue in its exceptions that Pizano's record was so poor that Respondent's insurance company determined he was no longer insurable, despite insurance underwriter Cheryl Hartz's testimony that since the April 25, 2009 accident was not Pizano's fault, he would not be assessed points for the accident and would remain eligible for coverage. Indeed, it was Andrade's refusal to submit proof that the accident was not his fault which caused him to be deemed ineligible for coverage – not his driving record. (Tr. 1016-1018) Finally, Respondent continues to argue in its exceptions that Respondent was not in possession of the CHP report. To make this argument, Respondent ignores Pizano's testimony, which was thoroughly credited by the Judge, that he provided the report to Andrade shortly after the accident and showed it to, and discussed it with, Sencion.[34] (ALJD 14:4-15; 34:43-54; Tr. 620-623) Again, Respondent's exceptions are at base nothing more than an attempt to overturn the Judge's credibility findings, and should be

[33] When asked at trial why she terminated Pizano, Andrade answered unequivocally "because (the insurance agent) told me that he in not insurable," and she did not claim it was because of his poor driving record or points on his record. (Tr. 1147)

[34] Respondent urges that the Judge erred when he noted that Sencion didn't deny Pizano's claim to have shown him the CHP report and discussed its findings with him because Sencion testified before Pizano at the trial (Sencion was called as an adverse witness during the Acting General Counsel's case in chief). However, Respondent ignores the fact that it could have recalled Sencion during its case to deny Pizano's claims, yet it chose not to do so. Respondent is correct that the Judge incorrectly noted that Andrade never denied receiving the CHP report; in fact, she never denied receiving the Pizano's written statement regarding the accident. This inadvertent error makes no difference to the Judge's ultimate conclusion, since he clearly credited Pizano's testimony that he provided a copy of the CHP report to Andrade.

thoroughly rejected.

III. CONCLUSION

Counsel for the Acting General Counsel submits that the foregoing, and the record as a whole, establishes that the Administrative Law Judge's findings that Respondent violated Sections 8(a)(1) and (3) of the Act by, *inter alia*, making coercive statements to employees, threatening to reduce and reducing employees' work assignments and hours, and by discharging employees Jesus Garcia Marquez and Alberto Pizano in retaliation for their Union and protected concerted activities, are fully supported by a preponderance of the record evidence and legal authority. Accordingly, Respondent's exceptions should be denied in their entirety and the decision of the Administrative Law Judge should be affirmed.

Dated: September 26, 2011

Respectfully Submitted

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FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OS TRANSPORT LLC and HCA MANAGEMENT, INC. **and** **TEAMSTERS LOCAL UNION NO. 350, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHANGE TO WIN**	**Case(s) 32-CA-25100** **32-CA-25399** **32-CA-25490** **DATE OF MAILING: September 26, 2011**

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 26th day of September 2011.	DESIGNATED AGENT /s/ Shirley M. Owens **NATIONAL LABOR RELATIONS BOARD**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OS TRANSPORT LLC and
HCA MANAGEMENT, INC.

and

Cases 32-CA-25100
32-CA-25399
32-CA-25490

TEAMSTERS LOCAL UNION NO. 350,
INTERNATIONAL BROTHERHOOD
OF THE TEAMSTERS, CHANGE TO WIN

ACTING GENERAL COUNSEL'S LIMITED CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. PRELIMINARY STATEMENT

On August 15, 2011, Administrative Law Judge Gerald M. Etchingham, hereinafter the Judge, issued his Decision and Recommended Order in the above-captioned matter wherein he found, *inter alia*, that OS Transport LLC and HCA Management, Inc., herein collectively called Respondent, violated Sections 8(a)(1) and (3) of the Act by engaging in a campaign of serious unfair labor practices, including implying that employees' attempts to obtain Union representation were futile, promising employees benefits to abandon their support for the Union, threatening to terminate employees, threatening to close the business, threatening to reduce and reducing employees' assignments and hours, and discharging employees, all in retaliation for their activities on behalf of Teamsters Local Union No. 350, International Brotherhood of Teamsters, Change to Win, herein called the Union, and/or their other protected concerted activities. The Judge's decision is wholly supported by appropriate findings of fact and

conclusions of law. However, the Judge failed to include an affirmative provision regarding one of the violations in the Notice to Employees and misspelled the name of an alleged discrimantee in one of the provisions of the Notice to Employees.

On September 12, 2011, Respondent filed its exceptions to the Judge's decision and a brief in support thereof. The Acting General Counsel will be separately filing an answering brief to Respondent's exceptions and supporting brief. In addition, and pursuant to the Board's Rules and Regulations, Series 8, as amended, Section 102.46(e), the Acting General Counsel files the following limited cross-exceptions to the Judge's decision:

II. EXCEPTIONS

No.	Page	Line	Exception
1.	Appendix at Page 2		To the Judge's failure to include an affirmative provision in the Notice to Employees related to the Judge's order that Respondent make employees Miguel Reynoso, Efrain Gutierrez Najera, Jesus Garcia Marquez, Alberto Pizano, Miguel Barron Salazar, Jose Primitivo Guzman, Jose Velasquez Gusman, Ceferino Urias Velasquez, Jose M. Urias, and Enedino Millan whole, with interest, for Respondent's unlawful reduction to their work and hours.
2.	Appendix at Page 2	1	To the Judge's reference to Jesus Garcia Marquez as "James" Garcia Marquez in the Notice to Employees.

III. ARGUMENT

A. Exception No. 1:

The Judge correctly found that Respondent violated Sections 8(a)(1) and (3) of the Act by reducing the work and hours of employees Miguel Reynoso, Efrain Gutierrez Najera, Jesus Garcia Marquez, Alberto Pizano, Miguel Barron Salazar, Jose Primitivo Guzman, Jose Velasquez Gusman, Ceferino Urias Velasquez, Jose M. Urias, and Enedino Millan. His

conclusions of law regarding this violation are located at page 30, lines 7-11, and page 36, lines 29-32, of his decision. These conclusions are wholly supported by his findings of fact, which are located at page 10, line 1, through page 12, line 17, of the decision.

Consistent with these findings, the Judge appropriately ordered Respondent to remedy this violation by rescinding the changes to the employees' work and restoring their hours, routes, Saturday work and wages to the status quo ante. See page 37, lines 8-17 and 44-46, and page 38, lines 17-20, of his decision. In accordance with these findings and conclusions, the Judge correctly included the following provision in the Notice to Employees:

> **WE WILL NOT threaten to reduce or reduce employees' work assignments and hours if they support the Union or engage in protected concerted activities, such as signing a letter complaining about working conditions.**

However, the Judge inadvertently failed to include an affirmative provision regarding this violation in the Notice to Employees. The record evidence and the Judge's findings and conclusions clearly support the inclusion of an affirmative provision regarding this violation in the Notice to Employees. As such, the Acting General Counsel urges the Board to correct the Notice to Employees to include an affirmative provision regarding that violation. *See e.g., Allstate Power Vac, Inc.*, 357 NLRB No. 33 at fn. 5 (2011). In accordance with the Judge's findings, the Acting General Counsel proposes the following provision be included in the Notice to Employees:

> **WE WILL restore the work assignments and hours of employees Miguel Reynoso, Efrain Gutierrez Najera, Jesus Garcia Marquez, Alberto Pizano, Miguel Barron Salazar, Jose Primitivo Guzman, Jose Velasquez Gusman, Ceferino Urias Velasquez, Jose M. Urias, and Enedino Millan, and WE WILL make them whole for any loss of earnings and other benefits they suffered as a result of our discrimination against them.**

B. Exception No. 2:

The Judge correctly referred to discrimantee Jesus Garcia Marquez throughout his decision and portions of the Notice to Employees. However, the Judge inadvertently referred to Mr. Garcia as "James Marquez Garcia" at page 2, line 1 of the Notice to Employees. As such, the Acting General Counsel urges the Board to correct the reference to Mr. Garcia at page 2, line 1 of the Notice to Employees to reflect his correct name.

III. CONCLUSION

For the reasons set forth above, it is respectfully requested that the Board find merit to the Acting General Counsel's limited cross-exceptions and correct the Judge's proposed Notice to Employees as requested.

Dated: September 26, 2011

Respectfully Submitted

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FORM NLRB-877

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OS TRANSPORT LLC and HCA MANAGEMENT, INC. **and** **TEAMSTERS LOCAL UNION NO. 350, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHANGE TO WIN**	**Case(s) 32-CA-25100** **32-CA-25399** **32-CA-25490** **DATE OF MAILING: September 26, 2011**

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S LIMITED CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 26th day of September 2011.	DESIGNATED AGENT /s/ Shirley M. Owens **NATIONAL LABOR RELATIONS BOARD**